BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RONALD P. REED Claimant VS. **PLASTIC PACKAGING TECHNOLOGIES LLC** Respondent AND **AMERICAN GUARANTEE & LIABILITY INSURANCE COMPANY** Insurance Carrier	)	Docket No. 1,061,812

ORDER

Respondent and its insurance carrier (respondent) requested review of the November 26, 2012, preliminary hearing Order entered by Administrative Law Judge (ALJ) Steven J. Howard. Ronald L. Edelman, of Kansas City, Missouri, appeared for claimant. Julie A. N. Sample, of Overland Park, Kansas, appeared for respondent.

The ALJ found claimant overcame the presumption of impairment contributed to by his ingestion of marijuana-laced brownies and, accordingly, ordered respondent to pay claimant temporary total disability and medical benefits. Attorneys for claimant and respondent were told to agree upon a specialist to treat claimant for his work-related injuries.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the November 20, 2012, preliminary hearing and exhibits, as well as the deposition transcripts of Robert Lee Perkins, Ronald J. Froehlich and Ryan R. Anderson, all taken November 15, 2012, together with the pleadings contained in the administrative file.

ISSUES

Respondent requests review of the ALJ's finding that claimant proved by clear and convincing evidence that his presumptive impairment did not contribute to his accidental injury. Respondent further contends the ALJ erred when he ordered the parties to agree to a specialist to provide treatment for claimant's injuries, arguing the ALJ should have ordered respondent to provide claimant with a list of two medical providers as required by K.S.A. 2011 Supp. 44-510h.

Claimant argues he successfully rebutted the statutory presumption of impairment created by the results of his drug test. Claimant states the parties have agreed on physicians to treat claimant's ongoing medical needs and respondent's issue concerning that subject is moot.

The issues for the Board's review are:

(1) Did the claimant rebut the statutory presumption of impairment by clear and convincing evidence?

(2) Does the Board have jurisdiction over the issue of the ALJ's Order that the parties agree on a specialist to provide treatment? If so, did the ALJ err in ordering the parties to so agree rather than ordering respondent to provide claimant with a list of two medical providers?

FINDINGS OF FACT

Claimant had an injury by accident on July 23, 2012, while employed by respondent as a production supply coordinator and warehouse laborer. He passed a pre-employment drug screen test and had a week of training. Claimant had about eight years of experience as a forklift operator before starting at respondent.

Claimant's first day to work a regular 12-hours shift at respondent was July 22-23, 2012. His shift started on July 22 at 6 p.m. His injury occurred about 5 a.m. on July 23, after working almost 11 hours of his first shift. At the time of the accident, claimant was operating a standing forklift in the hot box, a room where large rolls of plastic are cured before they come to the floor to be cut. He had gone into the hot box to pick up a pallet containing a roll of plastic to take to the cutters so the plastic could be cut. He pulled into the hot box slowly, lifted the forks of the forklift to where they needed to be, and entered the pallet like he was supposed to. He was picking up the pallet when the racks in back of the pallet collapsed. The forklift was at a complete stop at the time the racks collapsed, and claimant denied hitting a pallet or rack with his forklift. Claimant just heard a loud crash and saw product and racks coming down. He immediately maneuvered his body so he would be facing forward, and then was hit. Claimant was hit on the top of the head and

the back of the neck. He was scraped down the back. There was a roll bar on the forklift that protected claimant from being hurt worse than he was.

Claimant was taken to Providence Hospital and OHS for treatment and a drug screening test. He was found to be positive for marijuana, having a 60 ng/ml reading. Claimant said he was surprised because he had not smoked marijuana between the time he took the pre-employment drug screening test on July 2, 2012, and the day of the accident. Claimant later discovered he had eaten some brownies that, unknown to him, had been laced with marijuana the day before he started working regular shifts on July 22, 2012. He did not have the sense of having smoked marijuana or being high after eating the brownies and did not feel impaired in any way on July 23, 2012, after having worked nearly 11 hours.

Claimant said when he was at Providence Hospital, he was sent to have an MRI because of his back injuries but was unable to complete the scan because his head was hurting too bad. His sister was driving him home, but on the way he had a seizure. His sister called for an ambulance, and claimant was taken to the KU Medical Center. He was hospitalized in the ICU at KU Medical Center for five days. Claimant has not returned to work.

Ryan Anderson is a production supervisor at respondent. He worked the same shift as claimant and was the shift supervisor that night. Mr. Anderson said claimant denied running into the racks. Mr. Anderson testified there had not been any problems with any of the racks in the hot box before claimant's accident. The racks in the hot box are a little narrower than the racks throughout the rest of the plant, but product had never come down off the racks before. Mr. Anderson said there was plenty of room to set material on the racks, and there was room to maneuver a standing forklift.

It was claimant's first day on the job. Mr. Anderson could not specifically recall a conversation with claimant the day of the accident, although he was sure he introduced himself. He was not specifically watching over claimant to see that he was doing the job properly, but he did not see any evidence that claimant was not doing his job correctly. Mr. Anderson did not see any evidence that claimant was impaired in any way, although he probably only spent about 10 minutes with claimant during the shift before the accident and did not have a frame of reference as to what claimant was like. He said claimant had performed all his work duties during his shift in a timely and proper fashion.

After the accident, Mr. Anderson sent Robert Perkins, respondent's Human Resources Manager, an email that said, "Well, the faulty racking in the hot box almost cost us our first fatality at PPT."[1] Mr. Anderson, however, testified the racking in the hot box was not faulty. He had never in the past considered the racking to be faulty or voiced any

[1] Anderson Depo. at 8.

concerns that the racking was faulty. He said "faulty racking" was a poor choice of words on his part because if he thought the racks were faulty, he would not have allowed anyone in the hot box. The email indicated that the entire racking fell from behind claimant on top of the forklift. Mr. Perkins was not in the plant at the time of the accident but was involved in the investigation of the accident. Mr. Perkins spoke with Ryan Anderson, Erick Moorhead, Ron Froehlich, Dawn Black and claimant about the accident. There were no witnesses to the accident.

Mr. Anderson told Mr. Perkins that claimant denied hitting anything. Mr. Anderson told Mr. Moorhead, one of claimant's supervisors, and a Mr. Zimmer that he thought claimant had probably run into the rack that had fallen. He said the racks fell exactly where claimant would have been rotating his forklift, so he assumed claimant had pivoted to remove or place a roll in the racks and either hit the racks with the forklift or pushed something into the racks to make it fall. He admitted he had no evidence to support that conclusion. He looked and, although there were scrapes on the forklift, there was no evidence claimant had hit the racks. Mr. Anderson did not inspect the racks.

Mr. Anderson acknowledged that he had tapped into pallets in the hot box before. He has seen other forklift drivers bumping pallets and racks while operating the forklifts. He has never seen racking fall down after being bumped with a forklift.

Erick Moorhead testified that claimant arrived at work on July 22, 2012, on time and appeared to be properly functioning in his duties as a forklift driver. Mr. Moorhead could not tell that claimant was impaired in any way, but it was claimant's first night so Mr. Moorhead could not judge. Mr. Moorhead said that pallets in the hot box protruded out about 4 inches into the aisles because the racks were not wide enough for the pallets put there. Mr. Moorhead said it was a little tighter in the hot box than in the new warehouse as far as fitting pallets on the racks. Mr. Moorhead said he has not struck racks and pallets while operating a forklift and had not seen any other forklift driver make contact with the racks or pallets. He had never seen any racking collapse in the facility before, nor had he ever seen any product fall off the racking.

Ronald Froehlich is respondent's plant manager. He was not on the premises at the time of claimant's accident. Mr. Froehlich viewed the scene after the accident because he was responsible for cleaning up the area. Clean up involved removing the racking that had collapsed and putting it in storage. The damaged racking was obsolete, meaning he was unable to get replacement parts, and Mr. Froehlich made the recommendation to the General Manager that all the shelving in the hot box be replaced. Mr. Froehlich was not sure whether the new racks were wider.

Mr. Froehlich looked at the racking the day of the accident, and it appeared to him one of the legs had been damaged, causing the collapse. Based on damage he saw to the vertical I-beam on the racking, he believes claimant may have made contact with the shelving behind him as he was working. Mr. Froehlich saw no damage on the I-beam but

saw marks on the I-beam made by a roll of plastic. Mr. Froehlich did not know of any shelving ever collapsing or product falling as a result of the previous forklift contacts.

Mr. Froehlich met claimant at his new hire orientation. No one who had been working with claimant that night indicated that claimant was impaired in any way or was unable to properly perform his duties. He had no evidence that claimant was not clear-headed at the time the shelving collapsed.

Using a photograph, Mr. Froehlich showed Mr. Perkins where the forklift was sitting and how it was positioned. The photograph showed a pallet that appeared to have been pushed into the leg of the rack, causing everything to fall. Mr. Froehlich's speculation was that claimant had backed his forklift into the shelves behind him, striking one of the wooden pallets, and the pallet got pushed into one of the vertical support bars, causing the shelf to collapse. Mr. Perkins did not personally see any evidence of that. No one else gave Mr. Perkins any theories as to how the incident may have occurred. No one in the company told Mr. Perkins during his investigation that claimant was somehow impaired when the accident occurred. Mr. Perkins hired claimant, and claimant had been in training for a week before the accident. Respondent had no difficulties with claimant during that week.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501(b) states in part:

> (1)(A) The employer shall not be liable under the workers compensation act where the injury, disability or death was contributed to by the employee's use or consumption of alcohol or any drugs, chemicals or any other compounds or substances, including, but not limited to, any drugs or medications which are available to the public without a prescription from a health care provider, prescription drugs or medications, any form or type of narcotic drugs, marijuana, stimulants, depressants or hallucinogens.
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> . . . .
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> (C) It shall be conclusively presumed that the employee was impaired due to alcohol or drugs if it is shown that, at the time of the injury, the employee had an alcohol concentration of .04 or more, or a GCMS confirmatory test by quantitative analysis showing a concentration at or above the levels shown on the following chart for the drugs of abuse listed:
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> Confirmatory test cutoff levels (ng/ml)
>
> Marijuana metabolite[1] 15
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> . . .
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> (D) If it is shown that the employee was impaired pursuant to subsection (b)(1)(C) at the time of the injury, there shall be a rebuttable presumption that the accident, injury, disability or death was contributed to by such impairment. The employee may overcome the presumption of contribution by clear and convincing evidence.

ANALYSIS

1. Did the claimant rebut the statutory presumption?

No one disputes that claimant tested positive for the presence of marijuana metabolite in excess of the maximum amount allowed by the Act. With that established, K.S.A. 2011 Supp. 44-501(b)(1)(D) requires that claimant prove the presence of marijuana did not contribute to the accident by clear and convincing evidence. Clear and convincing evidence has been described by the Kansas Supreme Court as:

> [C]lear and convincing evidence is not a quantum of proof but, rather, a quality of proof. A party having the burden of proving a discharge from employment in retaliation for having filed a workers compensation claim must establish that claim by a preponderance of the evidence, but the evidence must be clear and convincing in nature. It is clear if it is certain, unambiguous, and plain to the understanding. It is convincing if it is reasonable and persuasive enough to cause the trier of facts to believe it.[2]

In this case, claimant testified he was not impaired at the time of the injury. Several witnesses outlined in ALJ Howard's Order indicated that the claimant did not appear to be impaired. Ryan Anderson testified he had seen other forklift drivers bumping pallets. Ron Froehlich testified the shelving in the area where the accident occurred was narrow, causing the product to stick out. Claimant worked operating a forklift approximately 11 hours of a 12-hour shift prior to the accident. Ryan Anderson testified that during the time worked prior to the accident, claimant performed all of his duties in a timely and proper fashion.

2. Medical Treatment

Respondent requests that the Board order it to provide a list of two physician pursuant to K.S.A. 2011 Supp. 44-510h(b)(1), which states in part:

> If the director finds, upon application of an injured employee, that the services of the health care provider furnished as provided in subsection (a) and rendered on behalf of the injured employee are not satisfactory, the director may authorize the appointment of some other health care provider. In any such case, the employer shall submit the names of two health care providers who, if possible given the availability of local health care providers, are not associated in practice together.

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[2] *Ortega v. IBP, Inc.*, 255 Kan. 513, 528, 874 P.2d 1188 (1994), citing *Chandler v. Central Oil Corp.*, 253 Kan. 50, 58, 853 P.2d 649 (1993).

Claimant is not alleging he is not satisfied with medical treatment. As such, K.S.A. 2011 Supp. 44-510h(b)(1) does not apply. The request is that the medical treatment continue with the physicians who are currently treating the claimant. Pursuant to K.S.A. 2011 Supp. 44-510h(a), it is the duty of the employer to provide the services of a health care provider. The duty to provide implies the duty to choose. The employer is empowered by the statute to choose the physician, unless the services of the chosen physician are not satisfactory.

However, respondent appeals the ALJ's jurisdiction to order the parties to choose. The issue whether a worker is entitled to medical treatment is a question of law and fact over which an ALJ has the jurisdiction to determine at a preliminary hearing.[3] The ALJ has the authority to be wrong on that issue.[4] Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.[5]

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[6] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[7]

CONCLUSION

Based upon the foregoing, this Board Member finds that the claimant has rebutted the conclusive presumption and has shown by clear and convincing evidence that the existence of marijuana metabolite did not contribute to his work-related accident on July 23, 2012. This Board Member also finds that the Board does not have jurisdiction pursuant to K.S.A. 2011 Supp. 44-534a(a)(2) to review the ALJ's order for medical treatment.

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[3] K.S.A. 2011 Supp 44-534a(a)(2).

[4] *Dale v. Hawker Beechcraft Acquisition Co., LLC*, Nos. 1,060,057 & 1,051,048, 2012 WL 3279495 (Kan. WCAB July 18, 2012).

[5] *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

[6] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[7] K.S.A. 2011 Supp. 44-555c(k).

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Steven J. Howard dated November 26, 2012, is affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of January, 2013.

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HONORABLE SETH G. VALERIUS
BOARD MEMBER

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Steven J. Howard, Administrative Law Judge